STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL ROBERT SIMS,

Defendant-Appellant.

UNPUBLISHED
October 12, 2006

No. 262959
Wayne Circuit Court
LC No. 05-001703-01

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and assault and battery, MCL 750.81. He was sentenced as a third habitual offender, MCL 769.11, to 10 to 20 years in prison for his felony conviction, and 93 days with credit for time served for his misdemeanor conviction. He appeals by right. We affirm.

Defendant first argues that the trial court committed error requiring reversal when it denied the jury's request to reconsider its guilty verdict on defendant's assault with intent to commit great bodily harm less than murder charge. We disagree. We review de novo questions of law. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005).

A jury verdict in a criminal case becomes final when it is announced in open court, assented to by the jury, and accepted by the trial court. MCR 6.420; *People v Henry*, 248 Mich App 313, 319-320 n 19; 639 NW2d 285 (2001). But a jury may change the form and substance of its verdict to coincide with its intent if the jury has not yet been discharged. *Id*. at 320 n 20, citing *People v McNary*, 43 Mich App 134, 142-143; 203 NW2d 919 (1972), rev'd in part on other grounds 388 Mich 799 (1972). Before being discharged, a jury may return to deliberations after announcing a verdict and polling discloses lack of unanimity. MCR 6.420(D). But once a jury is discharged, it may not be recalled in order to alter, amend, or impeach its verdict in a criminal case. *People v Rushin*, 37 Mich App 391, 398; 194 NW2d 718 (1971). A jury is not allowed to alter, amend or impeach its verdict after it has been discharged because the trial court can no longer ascertain the influence to which the jury has been subjected after it has left the courtroom, be it for two minutes or two days. *Id*. at 398-399. Thus, once a jury has been discharged it is prohibited from further deliberating a case. *Id*. To allow a jury to change its verdict after it has been discharged would not only offend the policies underlying the double jeopardy clause, but would also invite tampering with the jury after it had completed its deliberations. *Id*.

Here, the jury announced its guilty verdict of assault with intent to commit great bodily harm less than murder in open court. Furthermore, the jurors unanimously assented to the verdict when the jury was polled, and the trial court accepted the jury's verdict. Thus, the jury's verdict of guilty of assault with intent to commit great bodily harm less than murder was final. *Henry, supra* at 320; *Rushin, supra* at 398-399. Although the jury had not been discharged with respect to the remaining charges when it requested to reconsider its guilty verdict, that verdict had been published in open court; the trial court had polled the jury, and they assented to the verdict. The trial court accepted the verdict, and the jury had left the courtroom. Whether the trial court erred when it denied the jury's request to reconsider its verdict while the jury was still deliberating other charges against defendant is a case of first impression in Michigan.

As discussed, *supra*, a jury is not allowed to amend a verdict once it has been discharged because the trial court can no longer ascertain the influence to which the jury has been subjected after it has left the courtroom. That is, there is no way for the court to know if someone has improperly accessed the jury in an attempt to change its verdict. *Rushin, supra* at 398-399. Here, given the fact that the jury had left the court for a day after it had rendered its verdict, the policy considerations behind not allowing a jury to change its verdict after it has been discharged are equally compelling even though the jury had not been completely discharged and was still deliberating other charges. We conclude that under the circumstances of this case where the jury has rendered a verdict that the court has accepted after polling the jury, and the jury has left the courtroom, the trial court did not err when it denied the jury's request to reconsider the verdict. To hold otherwise would serve as an invitation for others to tamper with the jury after it had rendered a verdict. *Id*.

Defendant next argues that he was denied a fair trial when the trial court refused to honor the jury's request to review the transcripts of key witnesses. We conclude that defendant waived this issue when his trial counsel agreed with the trial court's decision to deny the jury's request to review the transcripts. An agreement by counsel with the decision of the court to deny a request to review the transcripts binds the defendant and effectuates a waiver of the issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant next argues that the trial court abused its discretion when it upwardly departed from the calculated minimum sentence range established under the sentencing guidelines. We disagree. We review a trial court's sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a "substantial and compelling" reason for departing from such range. *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003).

> [T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." [*Id*. at 264-265.]

Under the statutory sentencing guidelines, a trial court may depart from the guidelines only if it has substantial and compelling reasons to do so and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reasons for departure may not be based on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. *Id*.; MCL 769.34(3)(b). Further, the reasons must be objective and verifiable. *Babcock, supra* at 257-258. To be objective and verifiable, a reason must be based on actions or occurrences external to the mind and must be capable of being confirmed. *Abramski, supra*.

Here, in relevant part, defendant's sentencing guidelines range for his assault with intent to do great bodily harm less than murder conviction was calculated to be 29 to 85 months. MCL 777.65; MCL 777.21(3); MCL 769.11. The trial court sentenced defendant to 10 to 20 years in prison. Thus, defendant's minimum sentence exceeds his guidelines range by 35 months. When sentencing defendant, the trial court indicated that the prosecutor already stated much of what the trial court wanted to say. The court then added that its departure from the guidelines range was based on the fact that defendant tried to obstruct justice and deceive the jury when he lied while testifying. Taking the trial court's comments in the context of the prosecution's sentencing argument that defendant should receive a long sentence because his criminal history established that he could not be rehabilitated, we conclude that the trial court departed from the sentencing guidelines based on the fact that defendant had committed perjury and had minimal prospects for rehabilitation.

Defendant's perjury and chances of rehabilitation were not taken into consideration when calculating his guidelines range. Furthermore, defendant's testimony was contrary to both the victim's testimony that defendant hit him on the head with a gun and then later shot him in the leg, and to officers David Dismuke's and David White's testimony that defendant stated "I didn't shoot him, I shot at him," after Dismuke arrested defendant. Furthermore, defendant contradicted himself while testifying. First he stated that he only went to the neighborhood to protect his sister and coerce the victim to leave his aunt's house. Later he stated that once the victim left defendant's aunt's house, defendant followed the victim down the street and continued fighting him, despite the victim's attempts to get away. Moreover, defendant admitted that he used his cousin's name (Eric Woods) as an alias to deceive people, including the police on one occasion. Additionally, defendant's presentence investigation report indicates that he is a previously convicted felon who had received five "major misconduct violations while in [prison]." Therefore, because defendant's perjury and unlikelihood of being rehabilitated are facts capable of being confirmed, they were objective and verifiable. Accordingly, we conclude that the trial court did not abuse its discretion when it departed from the calculated minimum sentence range established under the sentencing guidelines. *Babcock, supra* at 264-265; *Abramski, supra* at 74.

Defendant next argues that the trial court abused its discretion when it scored offense variable (OV) 1 at 25 points and OV 2 at five points based on facts that were not reflected in the jury's verdict or admitted by defendant. We disagree. We review a sentencing court's scoring of a defendant's guidelines to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Whether *Blakely v Washington*,

542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), applies in the instant case is a question of law that this Court reviews de novo. *Bell, supra* at 282.

Under the sentencing guidelines act, a trial court scores 25 points for OV 1 if a defendant discharges a firearm "at or toward a human being." MCL 777.31. Furthermore, a trial court scores five points for OV 2 if "[t]he offender possessed a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32. Defendant specifically argues that the trial court violated *Blakely, supra,* because the facts it used to score these OV's were not reflected in the jury verdict because the jury did not convict defendant of the firearm charges against him. But our Supreme Court has concluded that the limitation imposed on factual findings by *Blakely, supra*, applies only to determinate sentencing schemes, and thus, does not affect the indeterminate sentencing scheme embodied in the Michigan sentencing guidelines. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Thus, defendant's argument that the trial court violated his Sixth Amendment rights pursuant to *Blakely* is meritless. The trial court may rely on information from several sources, including the presentence investigation report, a defendant's admissions, or testimony from a preliminary examination or trial. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988); *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

Here, the victim testified that defendant hit him in the head with a gun and shot him in the leg. Also, Dismuke and White testified that defendant stated after his arrest, "I didn't shoot him, I shot at him." Because record evidence supported the trial court's scoring OV 1 at 25 points and OV 2 at five points, the court did not abuse its discretion even though it based scoring on facts that were not reflected in the jury's verdict or admitted by defendant. *Drohan, supra* at 164; *McLaughlin, supra* at 671.

Defendant's final issue on appeal is that the trial court abused its discretion when it refused to give the requested self-defense instruction. We disagree. We review claims of instructional error de novo, reading the instructions as a whole to determine whether error requiring reversal occurred. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). We review a trial court's determination whether a jury instruction was applicable to the facts of the case for an abuse of discretion. *Id*. at 163. Even if jury instructions were somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and were sufficient to protect the rights of the defendant. *People v Davis,* 199 Mich App 502, 515; 503 NW2d 457 (1993).

A trial court must instruct the jury regarding the applicable law. MCL 768.29. A criminal defendant has a right to a properly instructed jury, and a requested instruction that is supported by the evidence must be given. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). "Conversely, an instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Further, before the trial court is required to instruct the jury regarding an affirmative defense, the defendant must produce some evidence on all of its elements. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). Thus, in *People v Droste*, 160 Mich 66, 80; 125 NW 27 (1910), our Supreme Court held that where a defendant denied the crime altogether rather than arguing that he committed the crime but only did so out of self-defense, the trial court did not err when it denied a defendant's request to have the jury instructed on self-defense. Similarly, in *People v Trammell*, 70 Mich App 351; 247 NW2d 311 (1976), this Court held that where the defendant

argued that his actions were an accident, the trial court did not err when it did not instruct the jury on self-defense.

To be lawful self-defense, the evidence must show that: (1) the defendant honestly believed that he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002); *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). Here, the victim testified that defendant approached him and hit him on the head with a gun and that after the victim was hit on the head, a struggle ensued over the gun. The victim broke away and went back to his friend's house. When the victim reached his friend's porch, he noticed that defendant was coming toward him with a gun pointed at him. Defendant came on the porch, grabbed the victim by his arm, pulled him off the porch, pointed his gun downward toward the victim's lower body and shot him. Defendant testified that he and the victim got into a fight, which progressed down the block to his friend's house, where the victim knocked on the door and was handed a gun by his friend. Defendant stated that he charged the victim, and a struggle ensued over the gun. Defendant stated that during the struggle, the gun was in the victim's right hand and the victim accidentally shot himself. Defendant presented the theory that the victim shot himself. He never argued that he shot the victim in self-defense. Therefore, no evidence was presented that defendant acted in self-defense. *Riddle, supra* at 119; *Deason, supra* at 31. Accordingly, the trial court did not abuse its discretion when it denied defendant's request to instruct the jury on self-defense. *Wess, supra* at 243; *Crawford, supra* at 620.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot